U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: AUG 26 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a wholesale meat market. It seeks to employ the beneficiary permanently in the United States as a butcher and meat cutter. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Provisions of 8 C.F.R. § 204.5(g)(2) state:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter turns, in part, on the petitioner's ability to pay the wage from the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The petition's priority date in this instance is April 30, 2001. The beneficiary's salary as stated on the labor certification is $14.89 per hour or $30,971.20 per year.

The Immigrant Petition for Alien Worker (I-140) referenced the sole proprietor's social security number of 139-94-7972 (SSN-7972), as did a partial 2001 Form 1040, U.S. Individual Income Tax Return, without page 1. The director deemed this insufficient to establish the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated August 13, 2003, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE exacted, for 2001 and 2002, the petitioner's tax returns, annual report, or audited financial statement, Wage and Tax Statements (Forms W-2) for wages paid to the beneficiary, and an itemized list of the sole proprietor's monthly living expenses.

In response to the RFE, counsel submitted no Form W-2 or account of monthly living expenses, but offered the sole proprietor's 2001 Form 1040 with schedules and statements that reflected information, as follows:

Proprietor's adjusted gross income (AGI)	$ 48,857
Petitioner's gross receipts (Schedule C)	$1,105,773
Petitioner's net profit (Schedule C)	$ 37,748
Wages paid and cost of labor (Schedule C, Part III, line 37	$0

The director noted the absence of the requested list of the sole proprietor's monthly expenses for 2001, as of the priority date, and weighed the ordinary business loss and deficit of net current assets for 2002. The contents and

consequences of the 2002 federal tax return appear fully, below. The director concluded that the AGI did not establish the petitioner's ability to support the household and to pay the proffered wage, as of the priority date, and denied the petition in a decision dated May 13, 2004.

On appeal, Sniegocki & Associates P.C., certified public accountant (CPA), lists several items of the sole proprietor's living expenses in 2001 and estimates them at $2,800 monthly, or $33,600 annually. *See* CPA letter dated July 12, 2004 (CPA appeal letter-living expenses). Since the sole proprietor did not pay wages to the beneficiary, it is necessary to examine net income at the priority date, in this case, the sole proprietor's AGI as reflected on the 2001 Form 1040, or $48,857, minus offsets.[1] Offsets are $30,971.20 for the proffered wage and $33,600 for living expenses, a total of $64,571.20. The remainder of AGI minus total offsets is a deficit of ($15,714.20).

On appeal, counsel notes in a brief that:

> As to monthly expenses for the petitioner in 2001, those are addressed in [the CPA appeal letter-living expenses]. However, it is noteworthy that many of the items on the letter such as the mortgage payment, tax payment, and health insurance payment, were already calculated and deducted in reaching the net income for 2001.

Presumably, counsel refers to items 1 and 6 of the CPA appeal letter-living expenses, a sum of $1,725 monthly, or $20,700 annually, and wants to take care that AAO does not count offsets to AGI twice in respect to the 2001 Form 1040, schedules, and statements.[2] Form 1040 states AGI at lines 33 and 34, and AAO accepts that amount. Deductions from income, such as concern counsel, are carried forward from Schedule A onto line 36 of Form 1040, with no effect on AGI.

The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The list of expenses is unpersuasive because it lacks a proper foundation. *See, supra,* n2.

The AAO will not consider, on appeal, the CPA appeal letter-living expenses or the brief on appeal. They are late and untimely since the director specifically requested a list of monthly expenses in the RFE. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. *See* 8 C.F.R. §§ 103.2(b)(8)(i)-(iii). Within the 12 weeks allowed, the petitioner may submit all the requested initial or additional evidence, submit some or none of the additional evidence and ask for a decision based on the record, or withdraw the petition. *See* 8 C.F.R. § 103.2(b)(11). If the evidence in response to an initial request does not establish eligibility for the benefit at the time of the filing of the petition, the petition will be denied. *See* 8 C.F.R. § 103.2(b)(12).

The petitioner was put on notice of required evidence of living expenses and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated, but the petitioner did not offer it. The

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[1] The I-140 specifically indicates that the beneficiary's is a new position, and, therefore, the AAO must consider both the proffered wage and estimated living expenses as offsets against AGI.

[2] It need be noted only in passing that counsel overlooks such family expenses as travel, entertainment, clothing, or the dependent's schooling. The CPA appeal letter-living expenses and the brief lay no foundation for such exclusions, and no authority supports the CPA's hearsay promulgation of the list of expenses without reference to the head of the family.

director will issue a decision based on existing submissions in the record. If failure to produce requested evidence precludes a material line of inquiry, the director may deny the petition. *See* 8 C.F.R. § 103.2(b)(14). The appeal will be adjudicated based on the record of proceeding before the director. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

As of the priority date, the sole proprietor's 2001 Form 1040, schedules, and statements did not establish the ability to pay the proffered wage. The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate such financial ability continuing until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. §§ 103.2(b)(1) and (12).

Even so, the AAO will complete the inquiry as to subsequent years, until the beneficiary obtains lawful permanent residence, to ascertain if they establish the ability to pay the proffered wage. In this case, that evidence is not straightforward. *See* CPA letter dated June 22, 2004 (CPA appeal letter-accounting method). The CPA letter-accounting method states the CPA's "understanding" that the Form 1040 filer sold his New Jersey residential real property in 2001 to sustain business operations in 2001. The 2001 Form 1040, whether at lines 13 or 14, or in attached schedules and statements, fails to report this transaction.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The CPA letter-accounting method introduced the 2002 Form 1120S, U.S. Income Tax Return for an S Corporation, and it averred the incorporation of Brother & Sister Food Service, Inc. on December 4, 2001 with EIN 25-1900882 (EIN882). Form 4797 of the 2002 Form 1120S reported the sale of commercial land only.[3] *See* CPA appeal letter-accounting method. The federal tax returns do not document all of the sales claimed, and they reveal no additional assets or a source of income.

The corporate petitioner submitted the 2002 Form 1120S as part of the response to the RFE. It reported an ordinary (loss) from trade or business activities of ($55,251), less than the proffered wage. Schedule L showed current assets of $67,232, minus current liabilities of $167,388, or a deficit of net current assets ($100,156), less than the proffered wage.[4]

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[3] The CPA letter-accounting method offered to prove "the eventual sale of [the sole proprietor's] business property and equipment." The Form 4947 with the 2002 Form 1120S, however, documents a sale of commercial land. The 2002 Form 1040 under SSN-7972, more fully discussed below, reports the erstwhile sole proprietor's lease income from commercial land. The sale of "business property and equipment," however, lacks any evidentiary foundation at all.

[4] The difference of current assets minus current liabilities equals net current assets. Current assets include cash, receivables, marketable securities, inventories, and prepaid expenses, generally, with a life of one year or less. Current liabilities consist of obligations, such as accounts payable, short term notes payable, and accrued expenses, such as taxes and salaries, payable within a year or less. *See Barron's Dictionary of Accounting Terms* 117-118 (3rd ed. 2000). If net current assets meet or exceed the proffered wage, the petitioner has demonstrated the ability to pay it for the period.

On appeal, the CPA, also, offers the "Accountant's Compilation Report" of representations of the management of the S corporation (2002 and 2003 unaudited statements) for periods ending December 31, 2002 and 2003. The accompanying report of the CPA admits that the CPA has not reviewed or audited the 2002 and 2003 unaudited statements, and states that the CPA does not express an opinion or any other form of assurance on them.

If the petitioner has recourse to financial statements, the regulation plainly and specifically requires audited financial documents. *See* 8 C.F.R. § 204.5(g)(2). Others are not convincing evidence of the ability to pay the proffered wage.

The CPA appeal letter-accounting method justifies the use of the 2002 and 2003 unaudited statements on the very premise that they embody "non-tax methods of depreciation." *See* the CPA appeal letter-accounting method. Counsel's brief on appeal, also, asserts that shareholders' equity (net worth) determines the funds currently available to pay the proffered wage. Controlling judicial authorities are to the contrary.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS), formerly the Service or INS, will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd* 703 F.2d 571 (7th Cir. 1983).

In *K.C.P. Food Co., Inc.*, 623 F.Supp at 1084, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp.*, 632 F.Supp. at 1054.

The CPA letter-accounting method contends that the beneficiary will fill an income-producing position, add stability to the "manufacturing floor," and add profitability to the petitioner. The CPA, however, has not documented any standard or criterion for the evaluation of such factors or earnings on account of them. For example, the petitioner will not replace any workers with the beneficiary, who occupies a new position. There is no evidence that his reputation would increase the number of customers. The CPA letter-accounting method assumes that high levels of turnover have resulted in higher labor costs. It advocates that the beneficiary's employment will reduce them. Contrary to this premise, federal tax returns for 2001 and 2002 reported no wages or salaries paid. *See* 2001 Form 1040, Schedule C, line 26 and 2002 Form 1120S, line 8.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The sole proprietor, as noted, filed a Form 1040 in 2001 as SSN-7972, but a Form 1120S in 2002 as EIN882. The latter tax return stated that it was pursuant to an incorporation in 2001. No proof, however, established that Brother and Sister Food Service, Inc., the corporate successor, at 713 South 22nd Street in Harrisburg,

Pennsylvania qualifies as a successor-in-interest to Brother and Sister Food at [redacted] New Jersey. This status requires documentary evidence that the corporate petitioner has assumed all of the rights, duties, and obligations of the predecessor company. Even if the petitioner were doing business at the same location as the predecessor, it would not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. In this case, the petitioner has not established the financial ability of either the predecessor or successor enterprise to pay the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

The business did not stay in the same location, however, and the record contains no documentation of the assumption of rights, duties, and obligations by the successor corporation. The consequences appear after the determination of all of the petitioner's evidence concerning the ability to pay the proffered wage.

The sole proprietor also submitted a 2002 Form 1040, Schedule E, in respect to the ability to pay the proffered wage, continuing until the beneficiary obtains lawful permanent residence. *See, supra,* n 4. The sole proprietor reports $6,120 of rental income, but neither the property nor the income is, as claimed, an asset of the corporate successor in interest in 2002.

A corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). CIS will not "pierce the corporate veil" to consider financial resources of individuals or entities who have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft,* 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003).

Neither the predecessor nor successor in interest has demonstrated the ability to pay the proffered wage. The changes in the status and location of the petitioner, also, require the dismissal of this appeal. Beyond the RFE and the decision of the director, the corporate successor is not demonstrably the petitioner and, moreover, is not doing business in the same location as the sole proprietor that submitted the I-140. The successor corporation is in a different city, state, and standard metropolitan statistical area (SMSA). The Form ETA 750 is valid only for the specific job offer in the area of intended employment. *See* 20 C.F.R. § 656.30(c)(2). If the employer moves to a new location, it should file a new I-140 to reaffirm the validity of the labor certification. CIS must deny the I-140 if the employer moves outside the SMSA, because such amendments relate to the test of the job market. CIS may not consider requests to amend Form ETA 750 in Part A in such matters as the wage offered and the job title, description, and requirements. *See* Memorandum of Office of Operations, dated December 10, 1993, "Amendment of Labor Certifications in I-140 Petitions," (CIS 1993 memorandum), issued by agreement with the Department of Labor.

The CIS 1993 memorandum is controlling. This petition cannot be approved for the successor corporation at its location in a new SMSA. Neither the predecessor nor the sole proprietor established the ability to pay the proffered wage, whether as of the priority date, or continuing until the beneficiary obtains lawful permanent residence. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements.

See Matter of Silver Dragon Chinese Restaurant, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Since CIS did not, and cannot, reaffirm the labor certification, CIS may not, for this additional reason, approve the petition. Counsel cites cases of the Board of Alien Labor Certification of Appeals (BALCA), but they relate to the ability to pay the proffered wage. They do not pertain to, or overcome the effect of, the 1993 CIS memorandum. These cases, moreover, do not appear to involve proceedings before CIS. They are not authorities that are published and binding on CIS. Though 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

After a review of the 2001 and 2002 federal tax returns, 2002 and 2003 unaudited statements, the CPA appeal letter-living expenses, the CPA appeal letter-accounting method, the 1993 CIS memorandum, and the brief on appeal, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence. It is further determined that no valid labor certification supported the petition, and the petitioner could not amend Form ETA 750 to establish the qualifications of the beneficiary for the stated position.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.